Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Mr. Brian Grolla,

complainant,

and

Canada Post Corporation,

employer.

Board File: 28073-C
Neutral Citation: 2011 CIRB 592
June 6, 2011

The Canada Industrial Relations Board (the Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, sitting alone pursuant to section 156 of the *Canada Labour Code (Part II–Occupational Health and Safety)* (the *Code*). A hearing was held in Toronto, Ontario from February 23-25, 2011. Final argument took place by way of videoconference on March 29, 2011.

Appearances

Mr. Ken Heydrich, for Mr. Brian Grolla;
Ms. Sharon L. Chilcott, for Canada Post Corporation.

I–Nature of the Complaint

[1] On April 8, 2010, the Board received a complaint under Part II of the *Code* from Mr. Brian Grolla (Mr. Grolla). Canada Post Corporation (CPC) had terminated Mr. Grolla's employment on March 16, 2010.

[2] Mr. Grolla, who had been a letter carrier at CPC for 29 years, alleged that his termination resulted from his exercise of the right to refuse unsafe work under section 128 of the *Code*.

[3] CPC took the position that several threatening and/or offensive emails Mr. Grolla had sent to different CPC managers were the sole reason for the termination.

[4] In March 2010, Mr. Grolla had raised concerns about alleged comments he attributed to fellow members of the Canadian Union of Postal Workers' (CUPW) bargaining unit. Those events spawned several grievances, including one contesting Mr. Grolla's termination, a claim under Ontario's *Workplace Safety and Insurance Act* (*WSIA*), a human rights complaint as well as a complaint to a Health and Safety Officer.

[5] The Board has a specific and limited jurisdiction under Part II compared to the other fora which considered or are considering Mr. Grolla's claims.

[6] The Board has concluded that Mr. Grolla did not exercise his right to refuse work under section 128 of the *Code*. However, if the Board is wrong in that assessment, it has also concluded that the evidence demonstrated Mr. Grolla's termination occurred as a result of separate, independent actions he took which were not related to any exercise of the right to refuse unsafe work.

II–Chronology of Events

[7] Most of the events in this case occurred between March 1 and March 16, 2010. The Board will review those events in some detail since evidence presented at the hearing raised questions in the Board's mind whether a valid work refusal under section 128 had occurred. The Board raised this

issue jointly with both parties during the hearing in order to ensure they had a full opportunity to address it.

[8] On March 1, 2010, at the start of his letter carrier shift, Mr. Grolla alleged that he had been threatened by a fellow union member JK. Mr. Grolla provided a hand-written note that same morning to his Superintendent at Depot 1, RA, which stated:

> At 900 am. [JK] said to me "I'm going to Kick your face in Union Rat boy."
>
> [*sic*]

[9] Exceptionally, due to the sensitive and personal nature of some of the written documents from which the Board will quote, the Board will use only witness' initials.

[10] The CUPW Co-Chair of the Health and Safety Committee, ID, assisted Mr. Grolla in reporting this and other incidents.

[11] The March 1 altercation apparently arose from the belief that Mr. Grolla had advised CPC that JK had been using his car to deliver his mail, despite not being authorized to do so. Mr. Grolla's actual involvement, which he denied, is not relevant to this decision.

[12] Given Mr. Grolla's allegations of threats, CPC placed JK on an emergency suspension from duty without pay. Mr. Grolla completed his route that day.

[13] On March 1, 2010, at 3:01 p.m., Mr. Grolla wrote to his union president, MP, copy to Superintendent RA, and gave a more detailed account of the incident. The subject line of Mr. Grolla's email was entitled "article 33 violence in workplace."

[14] Article 33 of the CPC-CUPW collective agreement, entitled "Workplace Violence Prevention and Protection," refers to CPC's policy on workplace violence. That policy arises from obligations under Part XX of the *Canada Occupational Health and Safety Regulations* (SOR/86-204) (*COHS Regulations*).

[15] On March 2, 2010, shortly after reporting for work, Mr. Grolla reported a second incident as described in his short hand-written statement:

> At 800 am at LCD1 [DM] approached me and called me a "fuckin' Stoolpidgeon". Supervisor [KW] was in the area. I request WSIB forms.
>
> [*sic*]

[16] The Board heard during testimony that the reference to "WSIB forms" arose from Mr. Grolla's claim that he had been injured on duty (IOD) as a result of the alleged comments. The CUPW Co-Chair of the Health and Safety Committee, ID, had advised him to ask for the WSIB forms.

[17] At 1:16 p.m., Mr. Grolla wrote to Superintendent RA. The subject line for Mr. Grolla's email was "Statement for WSIB." Mr. Grolla commented on the two reports of workplace violence he had made for March 1 and March 2, 2010. After he had described the March 2 incident, he wrote in the third paragraph of his email:

> Around this time I chose to remove myself from the workplace, as it was no longer a safe place for me to be. I will return to work when ALL mobbing issues against myself are resolved. I have filed a WSIB claim with my Doctor. I see her for a reassessment in 2 weeks.
>
> [*sic*] (emphasis added)

[18] Prior to leaving the depot, Mr. Grolla obtained from CPC representatives a Functional Abilities Form (FAF), a form to be completed by a physician for those claiming benefits under the *WSIA*.

[19] Mr. Grolla's physician's comments in the FAF were "Fully physically able to work–but will not return to work until management has resolved issues of violence in the workplace." While the FAF was dated March 2, CPC did not receive it until a later date.

[20] CPC interviewed JK, the alleged aggressor, on March 2, 2010, to obtain his version of the events stemming from the March 1, 2010 incident.

[21] CPC also met with other employees who had been present at the time of the incidents involving Mr. Grolla.

[22] On March 3, 2010, CPC sent Mr. Grolla a letter offering him alternate work during its ongoing investigation:

> This is a letter to inform you that since you do not feel safe working at Depot 1 due to the allegation of threatening and mobbing by other employees. [*sic*] Canada Post Corporation is prepared to offer you a temporary assignment at Depot 5. This assignment will be ongoing until the investigation is complete.
>
> (emphasis added)

[23] On March 4, 2010, CPC delivered a 24-hour notice of interview to Mr. Grolla's home. The interview was to take place on "Tuesday, March 5, 2010" at 11:00 a.m.

[24] At 11:02 on March 4, 2010, Mr. Grolla emailed Superintendent RA and stated that the interview date of "Tuesday March 5, 2010" was unclear. March 5, 2010, was in fact a Friday.

> [RA],
>
> I called your number. You did not answer. My Doctor will see me on March 16, 2010. See WSIB forms. You just sent me a notice of interview. The actual date of this interview is unclear. Check your notice.
>
> Interview notices are being delivered to my house by a LC in unauthorized PV. Please follow collective agreement.
>
> Brian

[25] Superintendent RA responded to Mr. Grolla by email March 4 at 11:09 a.m. advising "The interview is for Friday March 5, 2010 sorry about the confusion on date." [*sic*]

[26] The Friday meeting did not take place. On March 5, 2010, CPC sent Mr. Grolla another 24-hour notice of interview, this time for Tuesday, March 9, 2010, at 12:00 p.m.

[27] On March 5, 2010, Superintendent RA wrote to Mr. Grolla about CPC's efforts to interview him and assign him alternate work:

> On March 2, 2010 you sent me an email about the incident that too place a Hamilton Depot 1. You removed yourself from the Depot as you did not feel safe in the work environment at Depot 1. On March 3rd I offered you alternative work in Depot 5 to commence on March 4, 2010. You subsequently emailed me that you had called my number and there was no answer. I replied to that email on March 4, 2010 and stated that I have voicemail and call display. I also stated that you were to report to Depot 5 Hamilton until the investigation was complete.
>
> ...
>
> Brian, we have already offered you work at Depot 5 Hamilton on March 4, 2010 and you failed to show up for work. The offer is still valid and you need to report to work or provide medical documentation as to why you cannot report to another location.
>
> ...
>
> Your continued failure to report to Depot 5 will be communicated to WSIB.
>
> [*sic*] (emphasis added)

[28] On March 6 at 8:25 a.m., Mr. Grolla wrote to Superintendent RA and advised he could not meet with CPC for the following reasons:

> I will not enter LCD 5 Hamilton. I do not feel it is safe for me. Manager [DB]'s illegal employee advisory committee spread poison about CUPW reps through out the local.
>
> If I am ever able to return to work, I will deliver my route at LCD1, w43. Only the delivery. Someone else will sort and send the mail out until you deem LCD1 to be a safe workplace. I will count elastics at my home for 1.75 hours in the morning before I deliver. Mr. [DB] assigned me this duty in 1995.
>
> You made preceed unilaterally with your investigation, as prescribed in the Canada Labour Code. I wish to have H&S committee review any findings or decisions you make. I will then ask Hamilton Police Service to investigate.
>
> [*sic*] (emphasis added)

[29] The evidence disclosed that DB, the manager to whom Mr. Grolla's email made reference, had not been at Depot 5 for roughly 10 years.

[30] On Monday, March 8, the local CUPW president, MP, wrote to Superintendent RA about Mr. Grolla:

> Sorry I could not reply sooner I was in Toronto on Friday. Other than being copied on the e-mail, the Local has not been consulted about moving Brian to LCD 5. This will affect staffing at both LCD 1 and LCD 5.

[31] On Tuesday, March 9 at 9:03 a.m., Mr. Grolla again wrote to his CPC Superintendent RA about being convened for an interview:

> Yesterday I received an interview notice at my residence at 12.25pm. This was delivered in the presense of my spouse. The interview is scheduled for LCD 5 Hamilton at noon today.
>
> [RA], unless the employee advisory committee has changed the collective agreement, I believe that 24 hours written notice is required for an interview under article 10 of the collective agreement. I was going to phone you and inform you of this but you do not always answer your phones.
>
> [RA], all notices of interview from you will be viewed by my physician.
>
> [*sic*]

[32] Also on March 9, 2010, at 12:03 p.m., Mr. Grolla again wrote to CPC, his union and several other individuals, including CPC's Chief Executive Officer (CEO), and stated:

> I will not be at the interview that you have scheduled for this Friday. Doctor's orders. Please advise all concerned, including the heavy metal band, "KISS".

[33] On March 10, 2010, Superintendent RA sent Mr. Grolla another letter about CPC's attempts to interview him and reassign him to other work. The following two paragraphs were relevant:

> As per your email on March 6, 2010 you instructed Canada Post that you would not attend and that Canada Post could proceed unilaterally as per Canada Labour Code.
>
> ...
>
> On March 2, 2010 you provided a scrap of paper with the following written on it "At 8:00am at LCD 1 [DM] approach me and [called] me a Fucking Stoolpidgeon." and then stated you wanted to claim an IOD but would continue to work, approximately 30 minutes later you informed me that you were leaving and not returning. We tried to sit with you along with [ID] to fill out an Accident Investigation Form and

> you left the building stating you already gave a statement to Superintendent [RA]. We provided you with a Functional Abilities Form on this day and you have failed to provide this form completed, or any other medical that would support your continued absence.
>
> [*sic*]

[34] In Mr. Grolla's next March 10 email, sent at 12:15 p.m. to Superintendent RA, the union local president, MP, as well as several other CPC managers, including CPC's CEO, Mr. Grolla suggested to RA that it might not be a good idea if Mr. Grolla went to Depot 5:

> I received your registered letters today...I do not think it is safe for you if I go to lcd 5...I feel I may have limited self control in what I say, just like u do in your ability to not send registerd mail to my house while i have filed a wsib claim...
>
> [*sic*] (emphasis in original)

[35] The Board heard evidence that Mr. Grolla was aware of a personal matter involving RA. CPC considered Mr. Grolla's email as a threat to RA that he may spread the alleged information were he forced to go to work at Depot 5.

[36] In response to Mr. Grolla's email, CPC sent him a 24-hour notice of interview form "[t]o discuss your implied threat in the email you sent on March 10, 2010...".

[37] The 24-hour notice had been sent by PG, Manager, Delivery Operations. The next day, March 11, 2010, at 10:58 a.m., Mr. Grolla wrote to PG, copied a large number of other individuals, including the CEO and other managers at CPC, and stated:

> Just thinkin'. Remember the time at lcd 2 when u caught [Mr. M] with a whole set of flyers in his garage? What ever happened with that? Funny how there's different sets of rule, eh?
>
> [*sic*]

[38] Also on March 11, but about an hour and a half later, at 12:25 p.m., Mr. Grolla sent the following email about a CPC manager to Superintendent RA, his local CUPW president MP, CPC's CEO as well as other individuals:

> ...rumours abound that u got you tits chopped off. Was it a surgeon or a mechanically sequenced tit-chopping machine? can u bring them in so [MS] and I can take them fishing sometime if they are in jars?
>
> You'll like my nuts, slapchop
>
> [*sic*]

[39] On March 12, 2010, CPC sent Mr. Grolla a formal letter of warning about the March 10, 2010 email Mr. Grolla had sent to Superintendent RA which had included the sentence "I do not think it is safe for you if I go to lcd 5." (emphasis in original)

[40] CPC also noted that recent items sent to Mr. Grolla by Xpresspost that had been delivered to his home had been refused by him. CPC also referred to Mr. Grolla's refusal to attend investigative interviews on two occasions.

[41] CPC's letter concluded:

> Your implied threat and comments in the email sent on March 10, 2010 at 12:15 p.m. is totally inappropriate and threatening in nature. This misconduct is worthy of discipline and therefore this will serve as a formal letter of warning. Any further misconduct may result in further disciplinary action, up to and including dismissal.

[42] On March 16, 2010 CPC sent Mr. Grolla a discharge letter that referred to the two other emails he had sent on March 11 (see paragraphs 37 and 38) and concluded as follows:

> The tone and content of these e-mails is insubordinate, offensive and completely inappropriate. After reviewing these e-mails and the contents of your personal file this letter is to advise you are hereby discharged from employment effective upon receipt of this letter. The reason for discharge is reflected above and the contents of your personal file.

[43] On March 16, 2010, Superintendent RA conducted further interviews with regard to Mr. Grolla's allegations about the events of March 1 and 2.

[44] Also on March 16, Mr. Grolla filed a complaint with Human Resources and Skills Development Canada (HRSDC), contesting CPC's investigation of his allegations of workplace violence. Mr. Grolla's complaint read in part as follows:

> I suffered workplace violence. [RA] did not do proper investigation of incidents. RA did not interview all witnesses within contractual time-frames. CPC harrassing victim - no assisstance. Victim on medical leave. Statements supplied to [RA]. No written results given.
>
> [*sic*] (emphasis in original)

[45] Mr. Grolla's complaint also stated:

> [RA] spoke to witnesses before official interviews. Only witnesses of [RA]'s choice were interviewed. [RA] ended investigation prematurely. Did not involve H&S comm.

[46] CPC did not become aware of this Part II complaint until after Mr. Grolla's termination.

[47] In the March 17, 2010 minutes of the Joint Health and Safety Committee, CUPW referred to Mr. Grolla's situation:

> CUPW - disappointed there was an Regulation 20 incident in the Depot this past month.
> CPC. Incident has been investigated and report will be provided to CUPW Co Chair by March 19, 2010.
>
> [*sic*]

[48] On March 18, 2010, Superintendent RA, who was also Co-Chair of the Health and Safety Committee, provided a copy of his report to ID, who was the CUPW Co-Chair of the Health and Safety Committee. The letter started:

> This is a letter in response to the investigation of the Article 20 of the Canada Labour Code that happened at Depot 1 on March 1, 2010.
>
> [*sic*]

[49] The Board understands that the reference in this letter was to Part XX of the *COHS Regulations* entitled "Violence Prevention in the Work Place."

[50] CPC reviewed its process and concluded in its investigation report: "As a result of this investigation the Corporation closed the case of threatening and mobbing as inconclusive."

[51] Mr. Paul Curle, a Health and Safety Officer (HSO) under Part II of the *Code*, first met with Mr. Grolla on March 24, 2010 to discuss his March 16, 2010 Part II complaint.

[52] Also during that time, ID, the CUPW Co-Chair of the Health and Safety Committee, expressed his disappointment over CPC's investigation under "regulation 20" into the workplace violence incidents on March 1 and 2, 2010:

> I have reviewed your report concerning your investigation into the workplace violence incident that took place at depot one, Hamilton on March 1st and 2nd, 2010.
>
> As committee co-chair and as an employee working at this location, I support 100%, the policy of both union and management that advocates a workplace free of harrassment and violence. Zero tolerance is the accepted value in our society as a whole and of course it should be the case in the workplace.
>
> In this particular case, I have a number of concerns regarding your investigation, as well as the conclusions that your [*sic*] arrived at. In my opinion, this case has not been resolved and therefore should be re-investigated by a competent person, as is defined in the Canada Labour Code. Further, I am also concerned that you have not provided assistance to the victim in this case, Mr. Grolla. ...
>
> (emphasis added)

[53] The reference to "competent person" refers to section 20.9 of Part XX of the *COHS Regulations*:

> 20.9 (1) In this section, "competent person" means a person who
>
> (a) is impartial and is seen by the parties to be impartial;
> (b) has knowledge, training and experience in issues relating to work place violence; and
> (c) has knowledge of relevant legislation.
>
> ...
>
> (3) If the matter is unresolved, the employer shall appoint a competent person to investigate the work place violence and provide that person with any relevant information whose disclosure is not prohibited by law and that would not reveal the identity of persons involved without their consent.
>
> (4) The competent person shall investigate the work place violence and at the completion of the investigation provide to the employer a written report with conclusions and recommendations.
>
> (emphasis added)

[54] Mr. Curle conducted his investigation of Mr. Grolla's complaint on May 3 and 12, 2010. He issued three Directions under section 145 of the *Code*, two for CPC and one for Mr. Grolla.

[55] Mr. Curle's first Direction concerned Part XV of the *COHS Regulations* entitled, "Hazardous Occurrence Investigation, Recording and Reporting." In that Direction, Mr. Curle referenced *COHS Regulations* subsection 15.8(2), and concluded:

> Canada Post Corporation has not completed and submitted a Hazardous Occurrence Investigation Report HOIR/Supervisor Accident Investigation Report (SAIR) as prescribed, for Mr. Grolla's disabling injury which occurred on March 1, 2010.

[56] Mr. Curle's second Direction for CPC was issued in relation to Part XX of the COHS Regulations, "Violence Prevention in the Work Place," and concluded as follows:

> Subsection 20.9(3) If the matter is unresolved, the employer shall appoint a competent person to investigate the work place violence and provide that person with any relevant information whose disclosure is not prohibited by law and that would not reveal the identity of persons involved without their consent.
>
> Brian Grolla's allegation that he was subjected to work place violence in the Canada Post Corporation Depot 1 work location remains unresolved.
>
> Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1) of the *Canada Labour Code*, Part II, to terminate the contravention no later than June 7, 2010.

[57] HSO Curle also issued the following Direction to Mr. Grolla:

> The said health and safety officer is of the opinion that the following provision of the *Canada Labour Code*, Part II, has been contravened:
>
> No. 1: *Canada Labour Code*, Part II - Paragraph 126. (1) (c) While at work, every employee shall cooperate with any person carrying out a duty imposed under this Part.
>
> Mr. Grolla has refused to allow Canada Post Corporation to interview him in relation to his allegation that he was subjected to work place violence.
>
> Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1) (*a*) of the *Canada Labour Code*, Part II, to terminate the contravention immediately.

III–Relevant *Code* Provisions

[58] Section 122 of the *Code* defines "danger" as follows:

122. (1) In this Part,

...

"danger" means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system;

[59] Section 128(1) of the *Code* sets out an employee's right to refuse unsafe work:

128. (1) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that

(a) the use or operation of the machine or thing constitutes a danger to the employee or to another employee;

(b) a condition exists in the place that constitutes a danger to the employee; or

(c) the performance of the activity constitutes a danger to the employee or to another employee.

[60] Section 133 of the *Code* allows an employee to file a complaint if he or she believes that the exercise of the right to refuse unsafe work has resulted in a reprisal:

133. (1) An employee, or a person designated by the employee for the purpose, who alleges that an employer has taken action against the employee in contravention of section 147 may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.

(2) The complaint shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.

(3) A complaint in respect of the exercise of a right under section 128 or 129 may not be made under this section unless the employee has complied with subsection 128(6) or a health and safety officer has been notified under subsection 128(13), as the case may be, in relation to the matter that is the subject-matter of the complaint.

(4) Notwithstanding any law or agreement to the contrary, a complaint made under this section may not be referred by an employee to arbitration or adjudication.

(5) On receipt of a complaint made under this section, the Board may assist the parties to the complaint to settle the complaint and shall, if it decides not to so assist the parties or the complaint is not settled within a period considered by the Board to be reasonable in the circumstances, hear and determine the complaint.

(6) A complaint made under this section in respect of the exercise of a right under section 128 or 129 is itself evidence that the contravention actually occurred and, if a party to the complaint proceedings alleges that the contravention did not occur, the burden of proof is on that party.

(emphasis added)

[61] One of the conditions for a section 133 complaint involving the right to refuse unsafe work is that the employee must have complied with subsection 128(6) of the *Code*:

> 128. (6) An employee who refuses to use or operate a machine or thing, work in a place or perform an activity under subsection (1), or who is prevented from acting in accordance with that subsection by subsection (4), shall report the circumstances of the matter to the employer without delay.

[62] Section 133(6) imposes the burden of proof on the employer for those complaints which involve the right to refuse unsafe work under section 128 of the *Code*.

[63] Section 147 prohibits reprisals. Mr. Grolla alleged CPC terminated him for exercising his right to refuse unsafe work:

> 147. No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee
>
> (a) has testified or is about to testify in a proceeding taken or an inquiry held under this Part;
>
> (b) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or
>
> (c) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.
>
> (emphasis added)

IV–Issues

[64] Mr. Grolla's complaint alleged that he suffered a reprisal for exercising his right to refuse unsafe work. His April 8, 2010 complaint to this Board alleged his actions on March 2, 2010, constituted a work refusal. His May 13, 2010 reply to CPC's response argued he refused work on both March 1 and 2, 2010. At the hearing, Mr. Grolla also alleged the events of March 6, 2010, when CPC wished to meet him at Depot 5, also constituted a refusal.

[65] During the hearing of the evidence, the Board requested the parties' views whether the facts demonstrated that a section 128 work refusal had occurred. A valid section 128 work refusal constitutes a condition precedent to the Board's jurisdiction over section 133 complaints.

[66] Accordingly, two issues require the Board's response:

a) Was there a valid work refusal under Part II of the *Code*? and
b) Did CPC discipline Mr. Grolla for reasons other than his raising of safety concerns?

V–Analysis and Decision

a) Was there a valid work refusal under *Part II* of the *Code*?

[67] The Board does not require an employee to be overly formal in order to satisfy the obligation at section 128(6) of the *Code* to advise his or her employer of the exercise of the right to refuse unsafe work. An employee needs only to indicate by words and/or conduct that he or she is invoking the right to refuse: *John P. Grogan* (1986), 67 di 183 (CLRB no. 594).

[68] For example, in *George Court*, 2010 CIRB 498 (Court 498), the Board examined the overall context of a situation where an employee had said to the employer that it could not "make him work unsafe." The employer disagreed that the situation was unsafe and argued Mr. Court had not exercised his right to refuse. The Board was satisfied that the context clearly demonstrated a work refusal under section 128.

[69] The *Code*'s work refusal procedure in sections 128 and 129 exists to help determine whether a situation is unsafe. An employer cannot act unilaterally and discipline an employee when a disagreement exists whether the right to refuse unsafe work has been invoked properly.

[70] The work refusal procedure in sections 128 and 129 sets out the obligations of the refusing employee, the employer, health and safety representatives and HSOs.

[71] In this case, the Board has concluded that Mr. Grolla did not exercise his right to refuse unsafe work under section 128 of the *Code*. Instead, he pursued several other statutory recourses available to him as a result of the events of March 1 and 2, 2010.

[72] It is clear that on several occasions Mr. Grolla referenced safety concerns. He had the advice and support of ID, CUPW's Co-Chair of the Health and Safety Committee, from March 1, 2010 onward.

[73] For example, Mr. Grolla's March 2, 2010 note through which he requested WSIB forms stated in the third paragraph: "it was no longer a safe place for me to be...".

[74] CPC's letter of March 3, 2010, which offered alternative work, acknowledged Mr. Grolla's safety concerns: "since you do not feel safe working at Depot 1 due to the allegation of threatening and mobbing by other employees...".

[75] In Mr. Grolla's March 6, 2010 response to CPC about proposed alternative work at Depot 5, he wrote, *inter alia*, about Depot 5: "I do not feel it is safe for me...".

[76] The overall context in this case satisfies the Board that, while Mr. Grolla clearly had safety concerns resulting from the alleged comments of fellow employees, he knowingly pursued several statutory remedies other than a work refusal under section 128 of the *Code*. These remedies included a *WSIA* application and a reference to section 33 of the collective agreement dealing with workplace violence.

[77] Part II of the *Code* is very specific that certain steps must be taken in order for the Board to have jurisdiction over a complaint related to the right to refuse unsafe work.

[78] First of all, the employee must, taking into account the entire context, advise his or her employer of the exercise of the right to refuse unsafe work under section 128 of the *Code*.

[79] In this case, Mr. Grolla, CUPW and CPC representatives all acted consistently with the pursuit of remedies other than a section 128 work refusal.

[80] For example, Mr. Grolla's March 1, 2010 email sent at 3:01 p.m. referred to article 33 of the collective agreement. This section of the CPC-CUPW collective agreement refers to CPC's policy for dealing with violence in the workplace. Allegations of violence in the workplace are governed by Part XX of the *COHS Regulations*.

[81] For the March 2 incident, Mr. Grolla took the position that he had suffered an IOD for purposes of the *WSIA*. He completed the appropriate forms CPC provided to him and went to his doctor to have a FAF completed.

[82] Neither Mr. Grolla, CPC nor CUPW followed the procedures at section 128. They did not call in an HSO under section 129 of the *Code*. Those provisions clearly establish the procedure to follow after a section 128 work refusal.

[83] Section 128.1(3) also sets out the right to assign an employee to alternate work during the investigation of a section 128 work refusal:

> 128.1 (3) An employer may assign reasonable alternative work to employees who are deemed under subsection (1) or (2) to be at work.

[84] There was never any suggestion in this case that CPC's attempt to reassign Mr. Grolla to work at Depot 5 resulted from this section.

[85] Indeed, CUPW's letter of March 28, 2010, questioned whether CPC had the right to reassign Mr. Grolla to Depot 5, without first following the consultation process in the collective agreement.

[86] The Board is not saying that an employee who pursues a violence in the workplace complaint and a *WSIA* claim cannot also make a valid section128 work refusal. However, when all the participants focus as they did in the case on a *WSIA* claim, as well as on the violence in the workplace policy governed by the *COHS Regulations* Part XX, that does not automatically mean the requirements of the *Code* for a section 128 work refusal have also been met.

[87] This is not a criticism of the parties. In situations like alleged workplace violence, it may be that the process under Part XX of the *COHS Regulations* provides a more focussed process than a general work refusal under section 128 of the *Code*.

[88] Mr. Grolla's complaint to HSO Curle did not allege CPC failed to comply with the section 128 work refusal provisions. Had this been the case, Mr. Curle could have issued a Direction. Instead, Mr. Grolla raised different *Part II* violations with Mr. Curle.

[89] By contrast, in *Court 498*, *supra*, a complaint to an HSO had specifically raised allegations of the employer's failure to comply with the right to refuse procedure:

> [47] On July 16, 2008, Mr. Court filed a complaint under Part II of the *Code* with Human Resources and Social Development Canada. It was Mr. Court who initially contacted the Safety Officer.
>
> [48] On July 28, 2008, JGH and the Teamsters had the second step meeting on Mr. Court's July 11 grievance. At that meeting, JGH advised Mr. Court that he was being terminated. JGH apparently read to him the reasons for his termination, but did not provide him with a written termination letter. Mr. Shepley testified at the hearing that JGH has a policy of not providing termination letters.
>
> [49] On July 31, 2008, apparently as a result of discussion with a Health and Safety Officer, JGH's Joint Health and Safety Committee met and determined there was no unsafe situation when Mr. Court refused to work. The Joint Committee's minutes reproduced Mr. Shepley's statement of fact which opined that performing a required pre-trip inspection was not an unsafe procedure.
>
> [50] A Health and Safety Officer did eventually meet with JGH. JGH signed an "Assurance of Voluntary Compliance" (AVC) pursuant to which the employer agreed, inter alia, that "Employer must ensure that the Right to Refuse Dangerous Work process is followed in the manner prescribed in paragraphs (1)-(14)."

[90] Furthermore, the March 17, 2010 minutes of the Joint Health and Safety Committee treated Mr. Grolla's situation as one coming under Part XX of the *COHS Regulations*. CUPW's criticism of CPC's investigation, as set out in ID's letter, alleged that Part XX had not been followed since a "competent person" had not been appointed. There was no reference to a section 128 work refusal.

[91] Although Mr. Grolla clearly had concerns about his safety, the overall context does not satisfy the Board that Mr. Grolla exercised the right under the section 128 to refuse unsafe work. He did not satisfy the requirements of section 128(6) of the *Code*, which is a condition precedent to the Board's Part II reprisal jurisdiction for work refusals.

b) Did CPC discipline Mr. Grolla for reasons other than his raising of safety concerns?

[92] In the event the Board is wrong in its conclusion there was no work refusal under section 128 of the *Code*, the Board has considered whether CPC met its burden under section 133(6) of the *Code* to provide a reasonable explanation for the discipline it imposed.

[93] The Board does not examine whether CPC had just cause to terminate Mr. Grolla. That matter is currently before a labour arbitrator.

[94] Instead, the Board has to examine whether the reasons CPC put forward which caused it to terminate Mr. Grolla were the sole reasons for its actions, rather than a pretext designed to hide a reprisal against Mr. Grolla for exercising his right to refuse.

[95] The evidence satisfied the Board that CPC attempted to deal with a possibly violent situation which pitted two or more CUPW members against one another.

[96] Following Mr. Grolla's report of a threat, CPC suspended JK, and immediately removed him from the workplace.

[97] CPC gave notices to potential witnesses and conducted interviews. CPC attempted to meet with Mr. Grolla to get his version of events, given the need to conduct such investigations quickly.

[98] CUPW argued that CPC did not follow the collective agreement in terms of its investigation, including an obligation to consult. CUPW also had issues whether CPC's investigation respected the *COHS Regulations*.

[99] Mr. Grolla's complaint to HSO Curle did not raise any failure to follow procedural obligations related to a section 128 work refusal.

[100] HSO Curle, in response to Mr. Grolla's complaint, found that CPC had not abided by certain obligations under Parts XV and XX of the *COHS Regulations*. As a result, he issued three Directions,

two for CPC and one for Mr. Grolla.

[101] During CPC's investigation, Mr. Grolla, on his own initiative, decided to send emails to CPC representatives. He copied a large number of people, both at CPC and at CUPW.

[102] One email suggested that Mr. Grolla would disclose a private situation involving a CPC employee that would cause embarrassment. CPC treated this email as a threat.

[103] A second disturbing email made remarks about a female manager's anatomy. The local CUPW President, MP, during cross-examination, expressed shock at the email's content, indicated it was out of character for Mr. Grolla and agreed that he was not surprised there was a consequence for the email: "No, we figured something would happen."

[104] Similarly, an Employment Insurance (EI) interview summary Mr. Grolla filed in support of his case read:

> ...Claimant wrote emails to his manager complaining about these harassment mails [*sic*]; the manager became upset. Claimant was dismissed as the result...

[105] These facts satisfy the Board that until Mr. Grolla sent the emails at issue, CPC was conducting an investigation into his allegations of workplace violence. This process involved interviewing witnesses, including Mr. Grolla. It was not until Mr. Grolla sent the emails that CPC issued a warning letter. Then, after Mr. Grolla sent two more emails, CPC terminated his employment.

[106] The Board does not determine whether Mr. Grolla's emails constituted just cause for the termination of a 29-year service employee. An arbitrator will do that analysis. Instead, the Board evaluates whether CPC has met its burden under section 133(6) that events unrelated to a work refusal led to discipline.

[107] The Board has been satisfied that Mr. Grolla's sending of the emails motivated CPC, which had been in the middle of investigating Mr. Grolla's complaints under its workplace violence policy, to terminate his employment.

VI–Conclusion

[108] The Board has considered whether incidents which led, *inter alia*, to an investigation of workplace violence under Part XX of the *COHS Regulations* also resulted in a work refusal under section 128 of the *Code*. On the specific facts of this case, the Board was not persuaded Mr. Grolla invoked his right to refuse unsafe work under section 128 of the *Code*.

[109] Even if the Board had found a valid work refusal, CPC met its burden of demonstrating that its disciplinary actions occurred for reasons unrelated to a section 128 work refusal.

[110] Mr. Grolla's complaint is accordingly dismissed.

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Graham J. Clarke
Vice-Chairperson